United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

No. 76-1140

76-1140
B P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

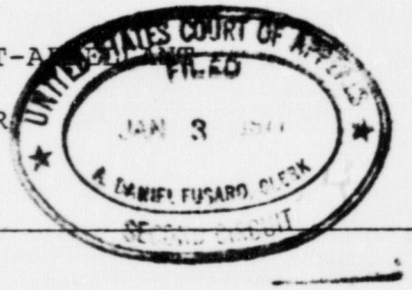
VS.

DAVID N. BUBAR, ET AL

AN APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF DEFENDANT-A

DAVID N. BUBAR



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REPLY BRIEF

The purpose of this brief is to clarify or amplify the defense strategy that trial counsel should have pursued, and which was alluded to on pages 29 and 30 of the defendant's brief and briefly dismissed on pages 49 and 50 of the Government's brief.

If the substantial defense of insanity were not going to be pursued, there nevertheless existed a rational strategy or defense which, it is submitted, most competent criminal counsel would agree with and try to follow in whole or large part. The main outlines are as follows:

1. Bubar is a rational, peaceful minister and spiritual advisor (with any reference to physic abilities being kept at a minimum);

2. His prediction of the Shelton fire would be objected to under Federal Rules of Evidence 403, as prejudicial. (If this objection were overruled, only his more significant and least "weird" predictions would be presented in defense);

3. Competent cross-examination technique would be employed on major governmental witnesses, especially Shaw, Wilhelm (false alibi), and Talalay (no water treatment), so their damaging testimony would at least not be reinforced, and might be lessened, especially on credibility and bias grounds;

4. On the defense case, a number of Bubar's parishioners would be presented only to testify to his good character and works and peaceful disposition;

5. Any credible witnesses to reasons for him receiving money from Moeller (need, printing presses, possibly even water treatment consultation) might be presented;

6. Either Bubar himself would be put on the stand and asked the single question of whether he had prior knowledge of the arson (was involved in it), after which he would cite religious conviction and priest-penitent privilege to avoid cross-examination; or (and especially if he could not truthfully answer the question the right way) he would not be called and the reasons for silence explained in summation. (This is a difficult area, and depends on how the case is going and other considerations, including ethical ones, and would probably be the subject of some disagreement among competent counsel);

7. Early recognition, through good preparation and observation at trial, that the Government's case against Moeller was not going well, and thus that antagonism between Bubar and Moeller should not appear if Bubar's counsel could help it. Thus, by trying to adhere to Moeller's strong defense, Bubar's counsel could later argue in summation the apparent lack of Bubar's motivation, where the arson had not been ordered by Moeller; and

8. Summation would of course emphasize the reasonable doubt standard and Bubar's good and religious character, attack Shaw and other weaknesses which may have developed in the Government's case, and stress the above "bonus"

This is to certify that a copy of the foregoing motion and brief referred to has this day been mailed first-class to Peter C. Dorsey, United States Attorney.

/s/ Paul W. Orth

Paul W. Orth

stemming from the Moeller defense--Bubar's lack of rational motive for arson.

The defense of "good man without good motive" in this complex case had good potential for an acquittal for Bubar by the jury, which after all did acquit Moeller. At the very least it cannot be said that this defense was not a competent and rational strategy--or that juries have not acquitted on much less. Thus, Bubar could have been afforded not only competent, but possibly successful counsel. As long as Bubar wanted to exercise his right to counsel at trial, the Court and counsel had the duty to maintain some standards of rationality, competency and effectiveness. Whatever right Bubar had to commit judicial suicide prc se, there is no benefit to defendants, the profession, and the integrity of the trial process to conjure up his "right" to do it by using incompetent and irrational counsel.

Respectfully submitted,

By _____
Paul W. Orth, court-appointed
counsel for David N. Bubar